LIABILITY OF MASSACHUSETTS STOCKHOLDERS IN FOREIGN CORPORATIONS.

THE liability of a Massachusetts stockholder, in a corporation organized in another State, to the creditors of the corporation has been directly passed upon by the Supreme Court of Massachusetts in some half-dozen cases. It has been discussed in various *dicta* of as many more cases. The first and leading case is that of Erickson *v.* Nesmith,[1] which came before this court in two different forms, and was subsequently brought before the Supreme Court of New Hampshire. A creditor of a corporation organized under the laws of New Hampshire sought to enforce a personal liability for debts of the corporation against a stockholder in Massachusetts, by an action of contract in the Massachusetts courts. The statute of New Hampshire creating the liability prescribes that "all legal proceedings hereafter commenced against any individual stockholder in any corporation in this State for the collection of a debt against said corporation shall be by a bill in chancery and not otherwise."

The Massachusetts court, in sustaining a demurrer to the declaration, said that the laws of a foreign State operate here only by comity. Our courts "will not suffer foreign laws or statutes to work injury or injustice upon [our] own citizens, nor permit [our] tribunals to be used for the purpose of affording remedies which are denied to parties in the jurisdiction of the State that enacted the law. . . . The liability on which the present action is founded is created solely by the statutes of the State of New Hampshire."

Subsequently the same plaintiff brought a bill in equity, in behalf of all creditors who wished to join, against the same defendant and any other Massachusetts stockholders, to enforce the same liability. The Massachusetts court sustained a demurrer to this bill also, for the reason that they had no jurisdiction that would reach such a corporation, out of this Commonwealth and having no assets here, or the creditors or stockholders residing elsewhere. The purpose of the statute was that the court should "hear and adjust all conflicting questions as to the indebtedness of the cor-

[1] 15 Gray, 221; 4 Allen, 233; 46 N. H. 371.

poration who were stockholders, and what were the equities between them."

Such was the interpretation of the statute by the New Hampshire court in the case of Hadley *v.* Russell.[1] That interpretation should be followed in this State. "When the statute creates a right and prescribes a remedy, that particular remedy and that only can be pursued." These two decisions of Erickson *v.* Nesmith were approved in New Hampshire when the same plaintiff brought a bill there to enforce the same liability, joining all the creditors and stockholders.

The principles upon which these decisions were based seem to be the following: —

1. The stockholder's liability is created solely by statute.
2. The particular remedy prescribed by that statute must be pursued.
3. The courts of Massachusetts will not permit such foreign statutes to work injustice to our own citizens.
4. Such statutes can operate here only by comity.

These principles have been adhered to in succeeding cases, and are submitted as a statement of the law of Massachusetts to-day.

The foundation of the stockholder's liability to the creditor is of course contractual. This was nowhere stated by the Massachusetts court in the decisions of Erickson *v.* Nesmith, but was undoubtedly assumed. It was, however, distinctly stated in the case of Hutchins *v.* N. E. Coal Mining Co.,[2] a case decided in the same year as the second of those cases. There the court say: —

> "The right of creditors to recover a judgment against a corporation for the amount of their debts, and to take out execution on which, in certain contingencies, the private property of stockholders might be taken, was one of the attributes or properties of its legal existence, by virtue of its charter, of which it did not and could not divest itself by entering into contracts in other States. On the contrary, such contracts must be presumed to have been made with reference to this very liability. Certainly the corporation and its stockholders are estopped from denying it."

This was a case where a creditor, living without the State, brought suit to enforce in our courts the liability of resident stockholders in a Massachusetts corporation. This he was permitted to do. This case dealt with the rights of a foreign creditor of a Massachusetts corporation.

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[1] 40 N. H. 109.

[2] 4 Allen, 580, 583.

The next attempt to enforce here the liability of a stockholder in a foreign corporation was made by a creditor of a New York corporation. An action in contract was brought under the provisions of the New York statutes, making the "trustees" of a company liable for its debts in case a report of the condition of the company was not filed within twenty days after January 1st in each year. The plaintiff was not permitted to recover.[1] Two chief grounds were assigned for the decision: first, that the New York statute was penal in its character, and so could not be given extra-territorial operation nor enforced by comity; second, because the plaintiff's claim was outlawed under the terms of that statute, and the defendant's liability had ceased to exist in New York.

The first reason given was based upon the decisions of the New York court construing the statute as a penal statute; but this construction seems to have been reversed by the later decisions of that court, and is at variance with the decisions of the United States Supreme Court.[2] On that ground a different result might be anticipated to-day. The second reason given for the decision was conclusive in that case, as the plaintiff had not brought himself within the terms of the remedy provided by the New York statute.

In New Haven Horse Nail Co. *v.* Linden Spring Co.,[3] the law of Connecticut was involved. A bill in equity was brought by a creditor of a Connecticut corporation against the corporation, as having its usual place of business in Boston, and against the individual stockholders, who were all citizens of Massachusetts. The bill alleged that "under the laws of Connecticut, according to the ordinary rules of equity, and independently of any statute, if a stockholder has not paid up the face value of his stock in full, he can, upon the insolvency of the corporation, be made personally and directly liable" to a creditor thereof.

This allegation was interpreted by the court to mean that the alleged obligations of the subscribers to stock is "independent of any statutory or penal liability which is expressed in terms." It is derived from the relation of the stockholder to the corporation under the laws of Connecticut. "It is of a peculiar character, involving the organic law by which the corporation is created, and

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1 Halsey *v.* McLean, 12 Allen, 438.

2 Flash *v.* Conn, 109 U. S. 371; Huntington *v.* Attrill, 146 U. S. 657.

3 142 Mass. 349.

requiring local administration." The court declined to take jurisdiction of the bill. The bill did not set out a statutory liability but claimed that equity jurisdiction existed under such circumstances by the law of Connecticut. The Massachusetts court say, in effect, that this is such an unusual ground of equity jurisdiction, and depends so much upon the law governing the creation of corporations in Connecticut, that it is justified in declining to take jurisdiction. There was no judgment against the corporation prior to bringing the bill, and the law of Connecticut was not set out with adequate allegations. To enforce a bill founded on such grounds, which were no foundation for equity jurisdiction under the law of Massachusetts, would be an injustice to the citizens of Massachusetts who were made defendants. No statute of Connecticut was actually invoked by the plaintiff, or considered by the court.

Under the decisions discussed in the foregoing pages, the policy of the Massachusetts courts seemed to be established, denying the right of creditors of foreign corporations to enforce here a statutory liability against resident stockholders. It was so regarded by the Massachusetts Supreme Court, as appears from the following *dictum* in the case of Smith *v.* Mut. Life Ins. Co.[1]: "No proceeding at law or in equity will lie to enforce the individual liability for corporate debts imposed upon officers or stockholders by the laws of another State in which the corporation is established."

But this was not the inevitable or logical conclusion from the cases decided. The principles laid down by the court in those cases seem perfectly sound. No case had been presented where the remedy prescribed by the statute creating the corporation was such as could be availed of in Massachusetts; it was too much to say, though, that no such case ever could be presented. This was later the conclusion of the court, as appears in a *dictum* in a subsequent case, Post & Co. *v.* Toledo R. R.,[2] when they say: —

"The difficulty which courts find in dealing with foreign corporations in matters relating to their internal affairs and management, the impossibility of compelling persons to perform their obligations, unless either the bodies or the property of such persons can be attached, the intimate relations existing between the States of the United States, and the well known fact that corporations are frequently organized by the citizens of one State under the laws of another and the principal offices of the cor-

[1] 14 Allen, 336, 342.

[2] 144 Mass. 341, 344.

poration kept in a State other than that of their creation, all induce us to give whatever aid the principles of law permit to persons who are endeavoring to enforce the obligations which attach to stockholders in foreign corporations."

Such was the status of this question, when the case of Bank of North America *v.* Rindge[1] was decided. In this case the plaintiff was a corporation of the State of New York, and a creditor of a Kansas corporation. The defendant was a resident of California, who, being found in Massachusetts, was sued here in an action of contract, as a stockholder in the Kansas corporation. The plaintiff undertook in the declaration to state the law of Kansas respecting such a stockholder's liability; but failed to state the law clearly or fully. The court sustained a demurrer to the declaration in the following language: —

"Limiting our decision to the facts now before us, it is this. That a resident of the State of New York cannot maintain in the courts of this State an action against a resident of the State of California, to establish his personal liability as a stockholder of a corporation organized in the State of Kansas, and having no place of business in this State, for a debt of that corporation to the plaintiff, under laws of Kansas such as are set forth in the declaration, providing for a certain special and limited liability on the part of stockholders, when no judicial proceedings have been taken in Kansas to ascertain and establish the liability of the defendant as such stockholder."

The court further stated several particulars in which the law of Kansas was not set out in the declaration, and added: —

"It is to be regretted that we are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that State. But we must take the case as the parties present it to us."

Great emphasis was thus laid upon the principle that the law of another State is a matter of fact in the courts of Massachusetts, and must be proved or pleaded like any other fact. In the light of that principle, however, the decision seems manifestly correct. The defendant in this case owed the plaintiff no obligation by the common law or the statutes of Massachusetts. Apart from the Kansas statutes creating the liability, the defendant had made no

[1] 154 Mass. 203.

contract with the plaintiff. Therefore the plaintiff, in not setting out the Kansas law in its declaration, failed to state a legal cause of action.

The court did not proceed on the ground that the suit was to enforce a penalty, or was opposed to the policy of our laws, but distinctly repudiated such grounds for the decision. It did, however, reiterate the ground stated in former decisions, that this was a case "in which complete justice can only be done by the courts of the jurisdiction where the corporation was created."

This decision still left open the possibility of an action in our courts, under a statute providing a remedy that was transitory, upon a declaration stating fully all essential points of law regarding the statute, with the interpretation of that statute by the courts of the State where it was enacted.

The Massachusetts Supreme Court in a recent decision has sustained such a declaration, and overruled the defendant's demurrer. In the case of Hancock National Bank *v.* Ellis,[1] the court construe the declaration as follows: —

"It is averred, in substance, that under the statute of Kansas, as interpreted by the decisions of the Supreme Court of that State, the liability of the defendant as a stockholder is a contractual liability, and arises upon the contract of subscription to the capital stock made by the defendant in becoming a stockholder, and that in subscribing to said stock and becoming a stockholder he thereby guaranteed payment to the creditors of an amount equal to the par value of the stock held and owned by him, which should be payable to the judgment creditors of said corporation who first pursued their remedy under the statute; and that an action to enforce said liability is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholders."

The court again states the principle, that the stockholders' liability must be determined according to the law of Kansas, as that law is set out in the declaration. If that law is accurately stated, then jurisdiction exists here to enforce the liability like other debts. The court also calls attention to the fact that the case stated in the declaration is different from any case heretofore presented to it, and sets forth a liability "as upon a contract which is suable anywhere." This is undoubtedly the determining principle in the case, that the remedy prescribed by the Kansas stat-

[1] 166 Mass. 414, 418.

utes for enforcing the stockholders' liability is an action of contract to be brought against the stockholders severally. As such, it can be enforced anywhere. That is the interpretation of the Kansas statutes by the Kansas Supreme Court, and that is binding upon all other courts.

In the light of these later decisions, therefore, the following principles should be added to those already deduced as governing our courts in these cases, in order to frame a successful declaration.

5. The laws of the State creating the liability, both the statute law and the judicial interpretation thereof, must be pleaded as facts.

6. The remedy prescribed by such laws must be transitory.

Although it is generally stated that the statutes of other States creating a stockholder's liability can operate in Massachusetts only by comity, it may be that such statutes have a stronger claim for recognition here. It may be that they come within the protection of the United States Constitution, Art. IV. Sec. 1, which provides that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." It was said by Waite, C. J., in Chicago & Alton Ry. *v.* Wiggins Ferry Co.,[1] that this clause "implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." The case of Huntington *v.* Attrill,[2] Glen *v.* Garth,[3] and Flash *v.* Conn,[4] would seem to support that contention.

It may be also that such statutes as those of Kansas come within the meaning of section one of the Fourteenth Amendment to the United States Constitution, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Inasmuch, however, as the Supreme Court of Massachusetts now seems ready to take cognizance of such cases by comity, when they are properly presented, it is unnecessary to invoke the aid of the United States Constitution.

William Reed Bigelow.

BOSTON, 1896.

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[1] 119 U. S. 615, 622.
[2] 146 U. S. 257.
[3] 147 U. S. 360.
[4] 109 U. S. 371.